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No. 82-1137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN RADIO ASSOCIATION, MMP, AFL-CIO, and RADIO OFFICERS UNION, NMEBA, AFL-CIO

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN INSTITUTE OF MERCHANT SHIPPING

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the court of appeals properly affirmed the Federal Communications Commission's authority under Section 352 of the Communications Act, 47 U.S.C. § 352, to exempt a class of ships from carrying a Morse Code radiotelegraph station, when the exempted ships carry an alternative array of equipment that the Federal Communications Commission concluded is equivalent or superior to radiotelegraph for safety and distress purposes.

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Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN INSTITUTE OF MERCHANT SHIPPING

The American Institute of Merchant Shipping ("AIMS")[1] respectfully submits this Brief in Opposition to Petition for a Writ of Certiorari filed by the American Radio Association, MMP, AFL-CIO and the Radio Officers Union, NMEBA, AFL-CIO (hereinafter referred to as "Petitioners") to review the October 8, 1982 decision of the United States Court of Appeals for the Second Circuit in *American Radio Association, et al. v. Federal Communications Commission, et al.*, Case No. 82-4045. The court's decision affirmed the Report and Order of the Federal Communications Commission ("FCC"), released on February 24, 1982, relating to the grant of a general exemption from the maritime radiotelegraph requirements pursuant to Section 352(b) (2) of the Communications Act of 1934, 47 U.S.C. § 352(b) (2). This "Brief in Opposition to Petition for

[1] AIMS, which participated as an Intervenor in the court of appeals proceeding, is a national trade association comprised of 30 members who own, operate, or charter the majority of the U.S. flag, oil and chemical tankers, liquified gas carriers, and other bulk carriers aggregating over 8 million deadweight tons.

a Writ of Certiorari" is submitted pursuant to Rule 22 of the Rules of the Supreme Court of the United States.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 690 F.2d 334 (2d Cir. 1982) and is reprinted in Appendix A of Petitioners' Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter referred to as "Pet. App."). The Report and Order of the Federal Communications Commission, PR Docket No. 79-336, FCC 82-75, was published at 47 *Fed. Reg.* 10220 (March 10, 1982) (Pet. App. at Appendix B).

COUNTERSTATEMENT OF THE CASE

1. Summary of the Proceedings Below

This case involves the lawfulness of the Federal Communications Commission's ("FCC") Report and Order (Pet. App. at Appendix B) granting a general exemption from the radiotelegraph[2] requirements of Section 351(a) (1) (A) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 351(a) (1) (A).[3] The exemption applies to cargo ships of 1,600 gross tons and

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[2]The term "radiotelegraphy" refers to a system of telecommunication for the transmission of written matter by the use of a signal code (*e.g.*, manual Morse Code). *See* 47 C.F.R. § 2.1. Radiotelegraph stations, which operate at 500 kHz and employ manually operated Morse Code, are absolutely dependent upon an operator versed in Morse Code and the peculiarities of propagation at 500 kHz. The term "radiotelephony" refers to a system of telecommunication set up for the transmission of speech or, in some cases, other sounds. *See* 47 C.F.R. § 2.1. In contrast to radiotelegraph stations, radiotelephone stations are *not* dependent upon an operator versed in Morse Code and can be operated by any member of a ship's bridge crew.

[3]Section 351 generally requires that except as provided in Section 352, any passenger vessel irrespective of size and any cargo vessel of 1,600 gross tons and upward shall be equipped with a radiotelegraph station.

upward when engaged in coast-wide voyages along the east, west, and Gulf coasts of the contiguous 48 states, where the routes of voyages of the vessels are within 150 nautical miles from land. To qualify for the exemption, these vessels must meet certain alternate communications and operational criteria as set forth in Section 83.480 of the FCC's rules, 47 C.F.R. § 83.480.[4]

The FCC's action was taken pursuant to its exemption authority under Section 352(b) (2) of the Act, 47 U.S.C. § 352(b) (2).[5] The decision was based upon the FCC's findings, developed in a protracted two-year rule making proceeding, wherein the FCC carefully considered extensive Comments, Reply Comments, and *ex parte* presentations by various parties.

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[4] Pursuant to Section 83.480, a cargo ship exempted from the radiotelegraph requirements of § 351 of the Act must have *all* of the following systems: a radiotelephone installation with a capability for radiotelephony via satellite; single sideband radiotelephone capable of operating on any distress channel in the marine sidebands; satellite voice and telex; narrow-band direct-printing radiotelegraph with Simplex Telegraphy Over Radio (SITOR) equipment; two VHF transceivers; 500 kHz radiotelegraph auto alarm with capability for message relay to shore using another mode; and participate in the Automated Mutual-Assistance Vessel Rescue System (AMVER). In addition, the ship must have emergency and reserve power sources, personnel on board to operate all of the systems installed, and the capability to keep all systems in satisfactory operating condition (Pet. App. at B-23).

[5] Section 352(b) provides, in relevant part, that:

> Except for nuclear ships, the Commission may, if it considers that the route or the conditions of the voyage or other circumstances are such as to render a radio station unreasonable or unnecessary for the purposes of sections 351-362 of this title, exempt from the provisions of such sections any ship or class of ships which falls within any of the following descriptions:
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> * * *
>
> (2) Cargo ships which in the course of their voyage do not go more than one hundred and fifty nautical miles from the nearest land; . . .

Ample record evidence supports the FCC's finding that the alternate system offers an equivalent, if not better, safety distress warning system.[6] Instrumental to the FCC's adoption of the general exemption criteria is the fact that, although all U.S. Navy ships have been removed from the radiotelegraph pool of mutual assistance, there have been no reports of accidents to other ships or derogation of that pool (Pet. App. at B-19). Approximately seven years ago the U.S. Navy abandoned the use of 500 kHz radiotelegraph and eliminated all radiotelegraph watches and substituted them with higher capacity radiotelephone, radioteletype, and satellite communications systems similar to the type of equipment required by the FCC to secure a general radiotelegraph exemption.

Also persuasive to the FCC is the fact that the Maritime Administration, in order to provide communications between the U.S. Navy and the U.S. merchant marines, has, at the request of the U.S. Navy, proposed to implement Public Law 96-387 (October 7, 1980) when sufficient funds become available. Under this legislation, the Maritime Administration will pay vessel operators to purchase and install the kind of radiotelephone, radioteletype with SITOR, and satellite systems embodied in the general exemption (Pet. App. at B-19, n.20).[7]

The FCC's decision-making was also based on the Coast Guard's endorsement of the efficiency of the proposed radio-

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[6]Petitioners' representation that the Comments submitted in the proceeding reflect a "nearly unanimous" view that radiotelephony is not as effective as radiotelegraphy (Petition for a Writ of Certiorari [hereinafter referred to as "Petition"] at 8) is incorrect. There is substantial record evidence to support the FCC's decision that the developments in the use of radiotelephony in the 45 years since the enactment of Section 351 make it "unreasonable and unnecessary" to require radiotelegraphy (Pet. App. at B-18). *See infra* pp. 10-12.

[7]Petitioners emphasize the fact that one spokesperson for the Navy opposed the FCC's proposed action on the grounds that it would jeopardize international and domestic shipping (Petition at 9). This spokesperson's view, however, is at odds with both the U.S. Navy's request to the Maritime Administration to equip the merchant marine vessels with the same kind of equipment needed for the general exemption, and with the U.S. Navy's abandonment seven years ago of radiotelegraph equipment and radiotelegraph watches.

telephone, radioteletype (SITOR), and satellite communications system. Full consideration and evaluation of potential system drawbacks are also reflected by the fact that the FCC adopted the Coast Guard recommendations for extra safeguards and additional equipment and capability to operate and maintain all of the equipment.[8] In addition, the move away from manual Morse Code radiotelegraphy was viewed by the FCC as consistent with international trends (Pet. App. at B-19).[9]

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[8] Petitioners correctly state that the Coast Guard opposed the FCC's *original* proposal (Petition at 9). On behalf of the shipping industry, AIMS also objected to the FCC's *original* proposal. However, these objections to the *original* FCC proposal are irrelevant. AIMS submitted a comprehensive counterproposal, involving additional radiotelephone and satellite equipment to provide complete radiotelephone coverage of the coastal waters, that the Coast Guard accepted and further refined. Importantly, the FCC adopted the Coast Guard's recommendations for improving the alternate system. Before reaching its decision, the FCC studied the Coast Guard's Comments on the efficiency of the enhanced communications system for safety purposes, and elected to follow the recommendation to require additional equipment, participation in the Automated Mutual-Assistance Vessel Rescue System (AMVER), and provide capability to operate and maintain all of the equipment (Pet. App. at B-21). Moreover, the Coast Guard concluded that the alternate system "would be an adequate substitute for the mandated radiotelegraph system" (Pet. App. at A-5).

[9] The FCC's Report and Order noted that the International Maritime Consultative Organization (IMCO) Maritime Safety Committee has adopted a proposal for a Future Global Maritime Distress and Safety System (FGMDSS) that would move the international maritime community away from reliance on outmoded ship-to-ship communications by radiotelegraphy and toward ship-to-shore and shore-to-ship communications by means of more advanced technologies. The FCC concluded that "a substitution of terrestrial radiotelephony, satellite, and narrow-band direct-printing equipment instead of manual radiotelegraphy equipment is fully consistent with modern concepts of structuring maritime distress systems, such as the planned FGMDSS system, and, in our view, will provide an effective safety communications system prior to the transition period to the FGMDSS" (Pet. App. B-19). In essence, the FGMDSS calls for an integrated maritime communications system consistent with the approach adopted by the FCC's Report and Order.

On February 24, 1982, after extensive examination of the issues and the record evidence, the FCC issued a final rule granting a general exemption from the radiotelegraph requirements of the Communications Act. On March 11, 1982, Petitioners filed a Petition for Review of the FCC's Order in the United States Court of Appeals for the Second Circuit. On October 8, 1982, the court of appeals denied the Petition for Review on the grounds that the FCC acted within its statutory authority, proceeded in accordance with relevant procedural guidelines, and there was substantial evidence in the record to support the FCC's action.

2. Legislative and Regulatory Background

The radiotelegraph requirements of Section 351(a)(1)(A) and the FCC's exemption authority in Section 352(b)(2) were first established in 1937 to "harmonize" the radio requirements for vessels in the domestic trade with the 1929 Safety of Life at Sea Convention, 50 Stat. 1121, T.S. 910 (1929) ("SOLAS" or "Safety Convention") requirements for vessels engaged in international voyages.[10] The radiotelegraph requirements of Section 351(a)(1)(A) are subject to the exemption provisions of Section 352(b)(2). Both the language of Section 352(b)(2) and its legislative history state that the FCC can grant "blanket" exemptions to a number of vessels, namely a "class of ships." The purpose of the exemption provisions in Section 352(b) is to relieve vessel owners of any "undue burden" resulting from the general requirements of Section 351 (a).[11]

Although Section 351(a) of the Act was drafted with the intention of ensuring that United States vessels, regardless of destination, complied with the Safety Convention's radiotelegraph requirements, Congress never intended this as an ironclad rule. Instead, Congress was careful to also afford the FCC sufficient flexibility to exempt vessels from the Section 351(a) radiotelegraphy norm if circumstances so warranted. Contrary to Petitioners' representations that Title III, Part II of the Act

[10] *See* H.R. Rep. No. 686, 75th Cong., 1st Sess. 3 (1937).

[11] S. Rep. No. 196, 75th Cong., 1st Sess. 3 (1937).

requires universal uniformity of radio communications standards between U.S. vessels on coast-wide voyages and vessels engaged in international voyages (Petition at 3), the primary purpose of the Act's maritime safety sections is to harmonize the laws governing the use of radio on domestic vessels with the 1929 Safety Convention. Harmonization does not, however, require rigid universal uniformity. It only requires reasonable efforts to achieve the ultimate purpose of the Safety Conventions and maritime safety provisions of the Act which is to promote "safety of life and property." 47 U.S.C. § 151.

Petitioners allege that Congress intended that all safety distress communications systems on U.S. vessels *must*, without exception, comply with international standards implemented under the SOLAS Conventions (Petition at 4-5). They fail to point out, however, that the SOLAS requirements apply only to ships on *international voyages* and are not binding on ships navigated solely on *domestic voyages* along the 48 contiguous states.[12]

An examination of the legislative history of the Communications Act demonstrates a clear Congressional intent to confer upon the FCC blanket exemption authority for groups or classes of ships, and furthermore, to grant to the FCC substantial administrative flexibility in exercising its exemption authority. Revisions to the Act to implement subsequent safety conventions demonstrate that Congress clearly intended to *retain* the FCC's authority to grant blanket exemptions to classes of ships on domestic voyages, even though such

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[12] SOLAS requirements are inapplicable to the types of voyages affected by the FCC's order. Chapter 1, Regulation 1(a) of 1948 SOLAS, 3 U.S.T. 3540, T.I.A.S 2495 (1948), provides that the treaty's regulations are applicable "only to ships engaged on *international voyages*." (emphasis added) Regulation 2(d) defines the term "international voyage" as "a voyage from a country to which the present Convention applies to a port outside such country, or conversely." The FCC's grant of a general exemption to U.S. cargo ships navigated *solely on domestic voyages* along the contiguous 48 states is unrelated to SOLAS requirements because *domestic voyages* are not governed by the treaty.

authority does not exist as to classes of vessels on international voyages.[13]

Despite the numerous and detailed amendments to the Act, Congress chose not only to retain but also to expand the FCC's Section 352 exemption authority.[14] Each time the Communications Act was revised to conform to the Safety Convention, Congress had an opportunity to delete the Section 352(b) exemptions in whole or in part. Failure to alter the FCC's general exemption authority reinforces the Congressional preference for maintaining exceptions to the Act's radiotelegraph requirements. By affording the FCC the discretionary exemption latitude reflected in Section 352(b), Congress acknowledged and deferred to the FCC's expertise and experience.

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[13] The 1954 amendments to the Communications Act, implementing the 1948 SOLAS, are particularly instructive. Not only did they retain the "class of ships" exemption authority, but they also *expanded* the FCC's exemption authority by adding a new subsection (c) to Section 352, 47 U.S.C. § 352(c), permitting the FCC to grant exemptions in cases where unexpected equipment failures might impose inequitable hardships. The expanded exemption authority was designed to temper the mileage limitations imposed by Sections 352(b)(1) and 352(b)(2). Implicit in increasing the FCC's exemption authority was the Congressional reliance upon administrative discretion and expertise in granting radiotelegraph exemptions. *See* S. Rep. No. 1583, 83d Cong., 2d Sess. 3 (1954).

[14] The 1965 Amendments to the Act further reinforce the Congressional desire to maintain the radiotelegraph exemptions in Section 352(b). The 1965 Amendments excepted nuclear ships from the FCC's general exemption authority. However, and notwithstanding the removal of nuclear ships from the FCC's general exemption parameters, Congress chose to retain the FCC's widespread general exemption authority. In fact, the 1965 Amendments resulted in a further *expansion* of the FCC's exemption authority by adding a new subsection (d) to Section 352, 47 U.S.C. § 352(d). The new subsection permits the FCC to exempt certain ships from the radio direction-finding apparatus requirements.

REASONS FOR DENIAL OF THE WRIT

Petitioners contend that this case presents "serious legal questions of first impression" concerning the authority of the FCC to grant exemptions from the detailed radiotelegraph requirements under Title III, Part II of the Act (Petition at 11 and 21). Contrary to Petitioners' characterization, this case presents no serious legal questions of first impression. Nor are there "special and important reasons" that would persuade the Court to exercise its discretion and grant the requested Writ of Certiorari pursuant to Rule 17 of its rules. Sup. Ct. R. 17. Rather, this case involves the routine exercise[15] by the FCC of its discretion under Section 352(b) of the Act to adopt a general exemption authorizing substitute equipment which will provide equivalent or better communications for distress and safety than the radiotelegraphy required for non-exempt systems.

Nor was there error by the reviewing court. The court of appeals carefully examined the administrative record and findings. It applied the correct standard of review and concluded: (1) that the FCC acted within its statutory authority in enacting the exemption to Section 351(a)(1)(A); and (2) the FCC's decision was neither arbitrary nor irrational but based on evidentiary support (Pet. App. at A-3 and A-5).

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[15] The FCC has previously exercised its discretion under Section 352(b) to grant a general exemption from the Act's radiotelegraph requirements. Apart from the two general exemptions cited at ¶ 5 of the Report and Order (Pet. App. at B-4), the FCC has also granted the two other general exemptions codified in Section 83.480 of the FCC rules, 47 C.F.R. § 83.480. *See In the Matter of Amendment of Part 83 to Provide An Exemption To Newly Constructed United States Cargo Vessels of 1600 Gross Tons and Upwards from the Radiotelegraph and Radio Direction-Finding Provisions of Title III, Part II of the Communications Act of 1934, as Amended, When Navigated on Sea Trials, Not More Than 150 Nautical Miles From the Nearest Land*, 61 F.C.C. 2d 151 (1976); *In the Matter of Exemption to All U.S. Passenger Vessels of Less Than 100-Gross Tons, Not Subject to the Radio Provisions of the Safety Convention, From the Radiotelegraph Provisions of Title III, Part II of the Communications Act of 1934, as Amended, When Navigated Not More Than 100 Nautical Miles From the Nearest Land*, 21 F.C.C. 2d 819 (1970).

1. To support their allegation that this case presents untried and important issues, Petitioners claim that the court below erroneously allowed the FCC "to grant exemptions from statutory requirements under conditions of its own devising, rather than under the circumscribed authority of Section 352(b) of the Act" (Petition at 13). The FCC did not "devise" conditions of its own in granting the exemption. Rather, consistent with this Court's line of decisions on statutory construction,[16] it determined that the plain text of Section 352(b) of the Act allows the FCC to exempt certain vessels from the Act's radiotelegraph requirements (Pet. App. at B-15).

Section 352(b)(2) of the Act provides that cargo vessels which, in the course of their voyage, do not go more than 150 nautical miles from the nearest land, are entitled to a general exemption, provided the FCC determines by valid criteria, which include the route or the conditions of the voyage, or *other circumstances*, that a radiotelegraph station is unreasonable or unnecessary. After reviewing the plain meaning of the statute, and the legislative history of Section 352(b),[17] the FCC concluded that it would be "unreasonable and unnecessary" to require ships with specified radio equipment and other safety requirements to continue to meet the radiotelegraph requirements (Pet. App. at B-18).

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[16] *See Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) ("words used in a statute are to be given their ordinary meaning"); *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, 465 (1968) ("we attribute to the words of a statute their ordinary meaning"). Moreover, this Court has promoted the general judicial practice of "defer[ring] to the agency's understanding of the statute which it administers." *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters*, 429 U.S. 507, 528 (1977); *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[17] The FCC determined that the plain language of the statute unequivocally provides the FCC with authority to exempt cargo ships of 1600 gross tons and upward from the radiotelegraphy requirement. To specifically address Petitioners' "strong arguments" that such a literal construction of the statute is not warranted by other provisions of the Act read in light of the legislative history, the FCC made a separate finding that the legislative history permits the adopted exemption. (Pet. App. at B-17).

The FCC determined that the disjunctive phrase "or other circumstances" in Section 352 permitted it to consider intervening historical and technological developments as factors in deciding whether or not to exempt a class of ships from the radiotelegraph requirement (Pet. App. at B-17). Historical and technological developments reviewed and relied upon by the FCC include: the fact that all telegraphy vessels are now mandatorily equipped with telephony equipment which renders them *de facto* members of the mutual pool of assistance (Pet. App. at B-17); the conclusion that the alternate communications system, if provided in lieu of the radiotelegraph station, would provide equivalent or better communications for maritime distress and safety (Pet. App. at B-3); the fact that the Maritime Administration has proposed to pay ship operators to install the type of communications equipment required to secure a radiotelegraph installation on ships found to be suitable for use by the United States government in time of war or national emergency; the proposal for a Future Global Maritime Distress and Safety system that would move the international maritime community away from reliance on radiotelegraphy and toward more advanced technologies such as radiotelephony satellite; and the seven year safety record of the U.S. Navy which substituted the 500 kHz radiotelegraph equipment and watch requirements on naval ships with radiotelephony and radioteletype (Pet. at B-18 and B-19).[18] The FCC's careful evaluation of these factors coupled with the Coast Guard's expert assessment of the safety features of the alternate equipment, supported the FCC's conclusion "that the cumulative effect of requiring the installation of all these capabilities [alternate equipment] clearly results in an adequate substitute for manual Morse telegraphy and, therefore, constitutes a sufficient basis for granting a general exemption" (Pet. App. at B-20).

This Court has provided specific guidance that technological developments are to be considered by the regulatory

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[18] *See supra* notes 7-9 and accompanying text. Importantly, there have been no reports of accidents to other ships or derogation of the radiotelegraphy pool of mutual assistance as a direct result of the removal of radiotelegraph equipment from naval ships. (Pet. App. at B-19).

agencies. *See Atchison, Topeka and Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (an agency may depart from prior norms if "changed circumstances mean that they are no longer required in order to effectuate congressional policy"); *American Trucking Ass'ns* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) (agencies should "adapt their rules and practices to the Nation's needs in a volatile, changing economy").[19] In accordance with this directive, the court below determined that the FCC was not precluded from exercising its exemption authority when it concluded that technological developments have superannuated radiotelegraphy and made general exemptions feasible (Pet. App. at A-4).

The FCC's promulgation of the exemption constitutes informal rule making under Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553. The appropriate standard of review, therefore, is whether the agency action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[20] It is well-settled that this standard of review is very narrow and does not empower the reviewing court to substitute its judgment for that of the expert agency. *Bowman Transportation Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974). Application of this standard is consistent with this Court's pronouncement that the FCC has broad discretion in carrying out its statutory mandate. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

The court of appeals applied the correct standard of review. It expressly found that the FCC had not acted irrationally or arbitrarily (Pet. App. at A-3 and A-5). It specifically rejected Petitioners' allegation that the alternative communications

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[19] *See also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (administrative agencies must be permitted "to adapt their rules and policies to the demands of changing circumstances").

[20] *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

system will not be as effective as the single radiotelegraph system, finding that the FCC had ample opportunity to review Petitioners' criticisms to this effect, and there was substantial evidence in the record to support the FCC's decision to reject those criticisms (Pet. App. A-4). The decision of the court of appeals is therefore correct and review by this Court is unwarranted.

2. To support their contention that the FCC failed to engage in a "reasoned consideration of statutory factors," Petitioners refer specifically to the FCC's alleged failure to address the statutory life saving purpose of survival craft radio [47 U.S.C. § 355] and transmissions for direction finding [47 U.S.C. § 351(a)(2)] (Petition at 10, 12, and 13). The FCC did not "fail" to consider these two factors; these provisions are simply inapplicable to the general exemption.

Petitioners fail to indicate that these provisions of the Act do not require the use of radiotelegraphy for ships of 1,600 gross tons or more. In addition, the FCC's action only exempts ships from carrying a radiotelegraph station; it does not provide an exemption from the direction-finding requirements of the Act. Thus, any ship affected by the FCC's action will still be required to have a direction-finding apparatus in compliance with the FCC's rules. *See* 47 C.F.R. § 83.458, *et. seq*. Furthermore, survival craft aboard the exempted vessels are still required to be fitted with radiotelegraphy transmitters capable of automatically transmitting the international radiotelegraph alarm signal and the international distress signal on 500 kHz. *See* 47 C.F.R. § 83.558(a)(4)(i). These transmissions can be received aboard the vessels qualifying for the exemption because in accordance with the FCC's radiotelegraph exemption rules, all such vessels must be equipped with a 500 kHz auto alarm receiver.[21] The elimination of radiotelegraph transmitting capacity does not, therefore, affect a vessel's ability to lend assistance to survival craft.

3. Petitioners also allege error by the court because it affirmed the Report and Order, notwithstanding the FCC's

[21] *See supra* note 4.

failure to provide "technical details and to conduct tests by which the equivalency of substitute equipment could be empirically measured" (Petition at 16). To buttress this contention, Petitioners rely upon *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980), and attempt to cast the FCC's decision as one which requires a cost-benefit analysis of the statistical possibility of future deaths *vis-a-vis* the economic costs of preventing those deaths (Petition at 16).

This case does not raise issues of cost-benefit analysis for the simple reason that it authorizes advanced communications technology which should *improve* the safety of life at sea. The decision is soundly based on empirical evidence demonstrating that the alternative communications system specified in the exemption will provide equivalent or better communications for maritime distress and safety.

The U.S. Navy's reliance on radiotelephony and radioteletype for the past seven years without any reported accidents to other ships or incidence of derogation of the radiotelegraphy pool of mutual assistance (Pet. App. at B-19) is an example of empirical evidence before the FCC. The FCC found the U.S. Navy's experience indicative of the seaworthiness of alternative equipment and "additional evidence that reliance on radiotelephonic communications is unlikely to have an adverse effect on overall distress communications" (Pet. App. at B-19). In addition to the Navy's experience, the FCC was persuaded by the Coast Guard's endorsement of the efficiency of the proposed radiotelephone, radioteletype (SITOR), and satellite communications systems for safety purposes. The FCC's decision is thus supported by record evidence, including empirical data, technical analyses, and an express endorsement from the federal agency most intimately involved in maritime safety. After reviewing such substantial evidence, the FCC exercised its expertise and granted a general exemption.

Petitioners' objection may thus be viewed as nothing more than the bold assertion that their expertise on communications matters is superior to and should be substituted for that of the FCC. This Court has clarified that expert agencies are expected

to bring their judments to bear in making decisions. In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), the Court, in response to the argument that the FPC should have adduced testimonial and documentary evidence to support its forecast of future conditions, deferred to agency expertise. The Court expressed the opinion that "we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." 365 U.S. at 29 (citation omitted).

The court of appeals' decision is therefore correct. Referencing the FCC's reliance on the Navy's elimination of radiotelegraph equipment and the concurrence of the Coast Guard, the court properly concluded that "[t]he Commission had ample opportunity to review the petitioners' criticisms, and there was substantial evidence in the record to support the Commission's decision to reject those criticisms" (Pet. App. at A-4).

Petitioners make a related argument that the FCC's Report and Order fails to provide sufficient technical detail for the substitute equipment on the exempted vessels—particularly the satellite component of the exemption (Petition at 17-18). All radiotelephone equipment, with the exception of satellite earth stations, is subject to strict FCC type acceptance rules, while satellite equipment is subject to INMARSAT standards. The exemption is sufficiently detailed to ensure an operative and efficient safety and distress system. Moreover, an agency's decision not to adopt detailed standards is entitled to special deference, especially in an area of rapid technological development or where circumstances in the industry may be evolving. *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979); *see also SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) (the administrative action may be in an area that does not "warrant rigidifying its tentative judgment into a hard and fast rule").

CONCLUSION

On the basis of the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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